Nos. 90-757, 90-1032, 90-813, & 90-974

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Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, *et al.*,
Petitioners,

v.

CHARLES ROEMER, *et al.*,
Respondents.

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

(Caption Continued on Inside Cover)

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE AMERICAN JEWISH CONGRESS, AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Protection of the voting rights of citizens is an important part of the Committee's work, and the Committee has represented minority citizens in challenges to discriminatory judicial elections in Mississippi, Louisiana and Florida under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. In the Louisiana case, the trial court found liability under Section 2 following a full trial on the merits (*Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988)), but was required to vacate the finding because of the Fifth Circuit's holding in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc).

The American Civil Liberties Union is a nationwide membership organization with over 250,000 members. It has a longstanding concern with promoting equality of the franchise. Since 1965, it has maintained a Southern Regional Office which represents minority voters in a number of voting rights cases, including the Voting Rights Act challenge to discriminatory judicial elections in Georgia.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure,

through litigation and education, the constitutional and civil rights of Hispanics living in the United States. MALDEF and its attorneys have engaged in substantial litigation to protect the right of Hispanics to an undiluted vote as guaranteed by the Fourteenth Amendment and Sections 2 and 5 of the Voting Rights Act.

The American Jewish Congress is a not-for-profit organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of Americans. The Congress believes that in a democracy, these rights depend upon free and fair access to the ballot and the political process. In accordance with that belief, the Congress has long advocated, both in legislatures and courts, vigorous protection of the right to vote.

The American Jewish Committee ("AJC") is a national organization founded in 1906 for the purpose of protecting the civil and religious rights of Jewish Americans. It has always been the conviction of the AJC that the security and the constitutional rights of Jewish Americans can best be protected by helping to preserve those of all Americans, irrespective of race, religion, sex or national origin.

Each of the *amici* participated in the legislative process culminating in the enactment of amended Section 2 in 1982. *Amici* are, therefore, particularly competent to offer views regarding the principles and history associated with the legislation. In addressing the major points that refute the lower court's restrictive construction of Section 2, *amici* have paid special attention to arguments and information not included, or not developed as fully, in the parties' briefs.

SUMMARY OF ARGUMENT

1. Contrary to the holding of the United States Court of Appeals for the Fifth Circuit, Congress did not intend to exclude discriminatory elections for state judges from the coverage of Section 2 at the same time it amended the statute in 1982 to eliminate the requirement of proving discriminatory intent.

A. An examination of the language and structure of Section 2 demonstrates that it covers all elections. Section 2(a) uses the terms "vote" and "voting" to describe Section 2's scope, and those terms are defined in Section 14 (c)(1) of the Act, 42 U.S.C. § 1973*l*(c)(1), to include "any primary, special, or general election . . . with respect to candidates for public or party office." By contrast, Section 2(b) does not serve the function of describing the scope of elections covered, but instead sets forth how "a violation of Section 2(a) is to be established." Thus, there is no warrant for concluding that the word "representatives," which appears only at the end of a conjunctive clause in one sentence of Section 2(b), is a definitional term intended to exclude an entire category of elections from the coverage of Section 2.

B. In addition, even if Section 2(b) could be read to define the scope of elections covered, the use of the word "representatives" does not indicate an intent to exclude elected judges, but instead refers to any elected official. The use of the word in political science literature and historical writing on the constitution and judicial selection, as well as its practical usage, demonstrate that it can readily be employed without excluding elected judges.

C. The purpose of the 1982 amendment was to expand the statute's coverage by eliminating any requirement of proving discriminatory intent. It is inconceivable that Congress, at the same time, would have removed from Section 2 an entire category of elections without any mention of the exclusion in the extensive debates, congressional hearings, and committee reports that accompanied the legislation. Furthermore, testimony at the congressional hearings concerning the 1982 amendments to the Act described pre-1982 vote dilution litigation involving elected judges, discussed discriminatory practices in judicial elections, and mentioned the aspirations of minorities for greater representation on the elected state bench. This contradicts the contention that Congress, without any indication in the legislative history, excluded discriminatory elections for judges from the scope of Section 2.

2. Judge Higginbotham, along with three other judges, concluded that Section 2 covers appellate judges but not trial judges. However, Congress never suggested any intent to limit Section 2 to such selective coverage, and the language, purpose, and legislative history refute Judge Higginbotham's concurrence. The view advanced by the concurrence is that the state interests behind maintaining electoral districts geographically coextensive with trial court jurisdiction are so strong that they automatically outweigh the goals of Section 2 and are therefore invulnerable to challenge under Section 2. That is nothing more than an attack on the potential remedy of subdistricting, by which judges are elected from subdistricts within a judicial district and hear cases from throughout the district. However, even if that analysis of subdistricting were correct, a state has other options to consider when adopting remedial plans—options that would protect any state interest in keeping electoral districts geographically coextensive with the trial judges' normal jurisdiction. The appropriateness of subdistricting as a remedy is not dispositive of the *general applicability* of Section 2 to trial judges. Moreover, there is no reason to believe that the state's interests would be undermined by subdistricting. In addition, the concurring opinion misconstrues the nature of the interests protected by Section 2, and places far too much weight on the "responsiveness" of elected judges to minority litigants if subdistricting were to occur.

3. Judge Clark, in a concurring opinion for himself, contended that Section 2 does not apply to any elections for trial or appellate judges where the judges' jurisdiction is geographically coextensive with their election district. There is no reason to believe Congress intended such an exception to Section 2. As with Judge Higginbotham's concurrence, Judge Clark's view is premised on what he perceives to be the fundamental state interest in retaining judicial election districts that are coextensive with the normal jurisdiction of the judges elected. That view erroneously assumes that subdistricting is the only remedy available for state to adopt, and misperceives both the state's interests and the interests Congress sought to protect with Section 2.

ARGUMENT

I. THE LANGUAGE, STRUCTURE, PURPOSE, AND LEGISLATIVE HISTORY OF SECTION 2 SHOW THAT CONGRESS INTENDED IT TO APPLY TO ALL ELECTIONS AND DID NOT INTEND TO EXCLUDE JUDICIAL ELECTIONS.

In 1982, Congress amended Section 2 to broaden its coverage by eliminating any requirement of proving discriminatory intent. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). The Fifth Circuit held that Congress, by using the word "representatives" in the text of Section 2, intended at the same time to exclude all elections for state court judges from Section 2's coverage, even though no such exclusion is mentioned anywhere in the numerous debates and hearings and the lengthy committee reports on the amendment. The Fifth Circuit's reliance on this one word runs afoul of this Court's frequent admonition that courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (internal quotations and citations omitted). As demonstrated below, the language and structure of Section 2, the purpose of

the 1982 amendment, and the legislative history all refute the Fifth Circuit's interpretation.

A. The Language and Structure of Section 2 Compel the Conclusion That All Elections, Including Judicial Elections, Are Covered.

The language and structure of the Act establish that Section 2 is not selective with respect to the offices covered, but is instead all-inclusive of every type of election and elected office.[1] Section 2 itself contains *no* office-by-office list of the specific elective positions that are covered. Instead, Congress established the scope of Section 2 by employing in Section 2(a) two terms—"vote" and "voting"—that are specifically defined in Section 14(c)(1) of the Act to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, . . . casting a ballot and having such ballot counted properly with respect to candidates for public or party office." 42 U.S.C. Section 1973*l*(c)(1). These broad definitions clearly encompass elections for judges.

Section 2(a), then, establishes the all-inclusive scope of the elections covered by using these two statutorily defined terms and providing:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b) of this section.

In contrast, Section 2(b), in which the word "representatives" appears, does not serve the function of defining the scope of the offices covered by Section 2. In-

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[1] This Court has stated that the starting point of statutory interpretation is the language of the statute itself. *See Demarest v. Manspeaker*, 111 S. Ct. 599, 602 (1991).

stead, Section 2(b) defines the *manner* in which a violation of subsection (a) is established. Section 2(b) begins by stating "[*a*] *violation of subsection (a) of this section is established if* [the specified showing is made]." (Emphasis added). The remainder of Section 2(b) sets forth the substantive showing that must be made, and contains a proviso dealing with the significance of the extent to which members of the protected class have been elected to office.

There is no such thing, therefore, as an elective office "covered" in Section 2(a) that is not also "covered" by Section 2(b), since Section 2(a) specifically states that it is to be applied "as provided in subsection (b) of this section," while Section 2(b) specifically provides that it sets forth *how* "a violation of Section 2(a) is established." Given this statutory structure and language, there is no support for the conjecture that an entire category of elections covered by Section 2(a) could suddenly turn up missing in Section 2(b).[2]

Indeed, most of the language of Section 2(b) echoes the same broad phrasing found in Section 2(a). The first sentence of Section 2(b) refers broadly to "the political processes leading to nomination or election in the State or political subdivision"—phrasing which by its terms incorporates all electoral processes without exception. That sentence continues by referring to the opportunity enjoyed by members of the protected class "to participate in the political process"—again, no exclusion of or reference to any particular category of elections—"and to elect

[2] Under the Fifth Circuit's analysis, judicial elections are covered by Section 2 as long as *intentional* discrimination is proven, while challenges to all other categories of elections are not governed by any intent requirement. 914 F.2d at 625 n.6. It is impossible to find this distinction anywhere in the statutory language. In *Burlington Northern R. Co. v. Okla. Tax Commission*, 481 U.S. 454, 463-64 (1987), this Court unanimously reversed a Court of Appeals holding that would have read into a statute an intent requirement for some types of actions covered by the statute but not for others.

representatives of their choice." The phrase as a whole ("to participate in the political process and to elect representatives of their choice") clearly focuses on the actions and opportunities of the protected class and not on the specific categories of offices subject to the Act. It would be a strange method of drafting that would set about to exclude a category of elections from the statutory coverage by placing the all-important definitional term only at the end of a conjunctive clause in a long sentence that otherwise broadly defines the substantive standards in question.[3] A straightforward and natural reading of the statutory language requires the conclusion that Congress did not intend the word "representatives" to exclude judicial elections from Section 2's coverage.

B. The Word "Representative" in Section 2(b) Refers to All Elected Officials and Does Not Exclude Judges.

There is a much simpler explanation for Congress' use of the word "representatives" than that employed by the Fifth Circuit majority. The portion of subsection (b) in which the word appears was taken from *White v. Regester*, 412 U.S. 755 (1973), which refers to minority groups whose members have less opportunity than others "to participate in the political process and to elect legislators of their choice." *Id.* at 766. Congress substituted the word "representatives" for "legislators." As the Sixth Circuit said in *Mallory v. Eyrich*, 839 F.2d 275 (1988), "[i]t seems evident that Congress was seeking a broader word to make it clear that subsection (b) is not

[3] The parallel language defining the scope of Section 2 and Section 5 of the Act—the latter of which has been interpreted by this Court to encompass elections of state court judges, *Georgia Board of Elections v. Brooks*, 111 S. Ct. 288 (1990), *summarily aff'g Brooks v. State Board of Elections*, No. CV288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court)—further establishes that Section 2 applies to judicial elections. This point is developed in the briefs of the petitioners and will not be discussed further here.

limited to legislative races." *Id.* at 279. Without pausing to list all of the covered offices by title—an unnecessary exercise since the scope of the Act is defined elsewhere—the drafters of Section 2 substituted a more generic term in place of the word "legislators."

The Fifth Circuit's holding hinges on its belief that the word "representatives" can have only one meaning, and that meaning necessarily excludes judges. 914 F.2d at 625-27. Political science literature refutes such a narrow and singular understanding of the concept of "representation." For instance, Professor Hannah Pitkin's highly-regarded work, *The Concept of Representation* (1967), notes that "[c]ourts, judges and juries have been discussed as representative organs of the state." *Id.* at 227. Pitkin offers several examples of how judges can be considered "representatives":

> From a formalistic standpoint, a judge is an agent of the state like all government officials. His pronouncements are not private expressions of opinion, but official utterances of the state. Hence he represents the state. In a democracy where all agencies of the government are servants of the sovereign people, the judge might be said to represent the people. From the "standing for" interpretation, he may represent by embodying the values of a society. From the doctrine that anyone whose commands are obeyed and whose leadership is accepted is a representative, a judge certainly represents. . . .

Id. at 116-117.

Use of the words "representatives" and "represent" with respect to judges are features of the historical writing on the Federalist and Jacksonian eras, the seminal moments in the establishment, respectively, of the federal and the elective state judiciaries. James Wilson, distinguished jurist and delegate to the Constitutional Convention, wrote of "[t]he extension of the theory and practice of representation through *all* the different de-

partments of the state" in America. 1 *The Works of James Wilson* 311 (R. McCloskey, ed. 1967) (emphasis added). Professor Edmund S. Morgan, writing about the development of state constitutions and the federal constitution in the United States, said this:

> A constitution superior to ordinary legislation could insure a strong position in government to the executive *and the judiciary* as well as the legislature, by making them all representatives of popular sovereignty and guaranteeing to them all a share in the power that supposedly emanated from the people.

E. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 260-61 (1968) (emphasis added). *See also*, G. Wood, *The Creation of the American Republic, 1776-1787* 456, 460, 596-99 (1969) (noting that American political thought of the late 1780s viewed all three branches of government as representatives of the people).

Many reformers of the Jacksonian era who favored the election of judges certainly considered judges chosen by the people to be representatives in some sense. Writing of that time, Charles M. Cook noted the belief of reformers that, through election, judges "would be made representative to the people and sensitive to their needs." C. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* 161 (1981).[4]

The Fifth Circuit's opinion suggested that judges can never be considered "representatives" because they occasionally must make decisions contrary to public will

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[4] *See also*, F. Green, *Constitutional Development in the South Atlantic States, 1776-1860: A Study in the Evolution of Democracy* 279 (1930); K. Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System* 103 (1979); Hall, "The 'Route to Hell' Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832-1920," in *Ambivalent Legacy: A Legal History of the South* 229, 237-38 (D. Bodenhamer & J. Ely eds. 1984).

and may not favor any particular constituency in discharging their duties. 914 F.2d at 626. Of course, the same is true of any number of elected executive or quali-legislative officials whom the Fifth Circuit would consider to be "representatives," such as prosecutors, constables, civil service boards, tax assessors, recorders of deeds, and prothonotaries. Indeed, legislators take an oath to uphold the Constitution, and occasionally act against the public will in fulfilling that oath.

Moreover, judges sometimes do consider and translate the popular will into judicial decisions, for instance in the development of the common law or the determination of what constitutes cruel and unusual punishment. Thus, judges are "representatives" or agents of the public in the ongoing evolution of legal doctrine.[5] Elected judges can also be said to "represent" the choice of the voters as to who will best serve the public good in discharging the duties of the judiciary.

Thus, the use of the word "representatives" does not evidence an intent to exclude elected judges.

C. The Purpose of the 1982 Amendment Was to Broaden Section 2's Coverage, and the Legislative History Belies Any Intent to Exclude Judicial Elections.

Congress' purpose in amending Section 2 was to broaden the Act's coverage by eliminating any requirement of proving intentional discrimination. *Thornburg v. Gingles*, 478 U.S. at 35. The Fifth Circuit's holding that Congress, at the same time, narrowed the coverage of Section 2 to exclude an entire category of elections

[5] Indeed, in a recent letter to the federal district judge in *Clark v. Roemer*, No. 90-952, the case involving Louisiana trial and appellate judges, the attorney for the State defendants in both *Clark* and in *Chisom v. Roemer*, No. 90-757, Robert Pugh, wrote of one elected Louisiana judge who had retired and who "is no longer *representing* his former district" (emphasis added) (December 28, 1990 letter from Robert Pugh to Hon. John V. Parker, reproduced in the attached appendix).

simply cannot be squared with the well-documented congressional intent, and is unsupported by even a sliver of evidence in the legislative history.[6]

[6] The Fifth Circuit incorrectly relied upon an alleged "presumption" that Congress intended to incorporate the phraseology of cases holding the one-person, one-vote principle inapplicable to judicial elections. 914 F.2d at 628. None of those cases are cited in the legislative history of the 1982 amendment. *See Demarest v. Manspeaker*, 111 S. Ct. at 603-04 (declining to apply a presumption that Congress incorporated prior administrative and judicial decisions in a statute where there was no evidence Congress was aware of the prior interpretations and where the statutory language did not support the interpretation at issue). Moreover, the presumption, if applicable, supports plaintiffs, because it imputes to Congress knowledge only of "existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). Much more pertinent to the 1982 Section 2 amendment than the one-person, one-vote cases is the 1980 holding of the Fifth Circuit in *Voter Information Project v. City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980). There, the Fifth Circuit held that a racial vote dilution challenge could be maintained against at-large judicial elections under the Fourteenth and Fifteenth Amendments irrespective of the inapplicability of the one-person, one-vote rule. Congress' presumed awareness of *Voter Information Project* would indicate that discriminatory judicial elections are not excluded from the coverage of amended Section 2, especially given that Congress broadened the statute in 1982 so that a showing of intent as required in litigation under the Fourteenth and Fifteenth Amendments would not be necessary.

Moreover, the Senate Report cites a 1977 en banc decision of the Fifth Circuit in a successful vote dilution challenge to districts used to elect county boards of supervisors *and* justices of the peace (who are trial judges in Mississippi). *See* S. Rep. at p. 29 n.114, 31 n.121, citing *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977) (*see* 554 F.2d at 140 n.1 for description of offices at issue in *Kirksey*). *See also, e.g., United States v. Board of Supervisors of Forrest County*, 571 F.2d 951, 956 n.9 (5th Cir. 1978) (noting that districts at issue in vote dilution challenge were used to elect justices of the peace, among other officials). These and other vote dilution suits dealing with county boards of supervisors and justices of the peace in Mississippi were also specifically discussed in the testimony of several witnesses at the House and Senate hearings. *See* Part I.C, *infra*, for a discussion of this testimony.

To the contrary, the available legislative history supports the proposition that all elections, including judicial elections, remain within the coverage of amended Section 2. As stated in the Senate Judiciary Committee report accompanying the 1982 amendment, Congress amended Section 2 in order "to prohibit *any* voting practice, or procedure [that] results in discrimination" without regard to whether there is proof of discriminatory intent. S. Rep. 97-417, 97th Cong. 2d Sess. 2 (1982), *reprinted* in 1982 U.S. Code Cong. & Adm. News 177, 179 (emphasis added). *See Thornburg v. Gingles*, 478 U.S. at 43. While various lower court opinions [7] and the briefs of some of the parties in this Court discuss other aspects of the legislative history, *amici* focus here particularly on the congressional hearings held on the 1982 extension and amendment of the Voting Rights Act.[8]

In interpreting the Voting Rights Act, this Court has looked to the purposes of the Act and the forms of discrimination it was designed to remedy, including those described in the testimony of witnesses during the congressional hearings. *See, e.g., Perkins v. Matthews*, 400 U.S. 379, 387-389 (1971); *Allen v. State Board of Elections*, 393 U.S. 544, 563-569 (1969). At the 1981 and 1982 congressional hearings in both the House and the Senate, numerous minority witnesses and representatives of civil rights organizations testified about discrimination in judicial elections, presented examples of how vote dilution hampered the election of minority

[7] *See, e.g., Mallory v. Eyrich*, 839 F.2d at 278-80.

[8] *Extension of the Voting Rights Act: Hearings on H.R. 1407, H.R. 1731, H.R. 3112, H.R. 3198, H.R. 3473, and H.R. 3498 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) ("House hearings"); *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong. 2d Sess. (1982) ("Senate hearings").

judges, and articulated the need for better minority representation on the bench.

Several of the witnesses gave testimony and statements concerning extensive pre-*Bolden* litigation over dilution of black voting strength in the drawing of districts used to elect Mississippi county supervisors, justice court judges (justices of the peace), constables, county school board members, and county election commissioners.[9] Mississippi State Senator Henry J. Kirksey described the outcome of one such lawsuit in 41-percent black Warren County, Mississippi, to respond to Senator Metzenbaum's questions concerning whether the use of the "results" test prior to *City of Mobile v. Bolden*, 446 U.S. 55 (1980), had resulted in "proportional representation":

> In 1979, the Federal district court ordered into effect a plan which resulted in the election of one black county supervisor, one black justice of the peace, and two black constables—the first black elected officials in Warren County since reconstruction. Since there are five supervisors, justices of the peace, and constables from each district, we clearly did not obtain proportional representation.

Senate hearings at 669. Referring to this same litigation, a statement submitted by Robert M. Walker, Field Director of the Mississippi NAACP, noted that as a result of the litigation "a Black supervisor, a Justice Court judge and two constables were elected, giving Black Warren countians representation for the first time since the 19th century." House hearings at 2648.[10]

[9] In Mississippi, justice court judges, formerly known as justices of the peace, are judicial officers at the trial court level.

[10] *See also* House hearings at 1745 (testimony of Senator Kirksey in response to questioning by Representative Don Edwards, House Subcommittee Chairman, explaining that "we are able to elect two county supervisors, two justices of the peace, and some other officers" as a result of voting rights litigation in Hinds County, Mississippi).

Amicus Lawyers' Committee for Civil Rights Under Law submitted a report to both the House and Senate subcommittees which included a detailed description of the Mississippi lawsuits over county districting and made numerous specific references to the impact of the lawsuits on county justice of the peace elections.[11] The Senate Judiciary Committee Report cites one of these lawsuits in which the Fifth Circuit held that discriminatory lines used to elect county boards of supervisors, justices of the peace and other county officials were unlawfully dilutive of black voting strength.[12]

The hearings included examples of the difficulties faced in electing minorities to judicial office. A witness representing *amicus* MALDEF helped document the continuing impact of race in electoral politics by describing in detail how the local Democratic committee in Aransas County, Texas, engineered the election of a deceased person as justice of the peace in order to prevent the election of the first Mexican-American to that office.[13] Full-page newspaper advertisements, reprinted in the House hearings transcript, advised voters:

> THE NAME OF LAWRENCE MILLER, Candidate for Justice of the Peace, Precinct 1, will be on the Democratic Ballot on May 6th. You are entitled to vote for him even though he is now deceased. If Judge Miller receives a majority of the votes cast, the Aransas County Democratic Committee will convene and select a nominee whose name will be certified to be placed on the General Ballot for November.

[11] Report of the Lawyers' Committee for Civil Rights Under Law, *Voting in Mississippi: A Right Still Denied*, reprinted in House hearings at 499, 516-28. *See also* Senate hearings at 673 (prepared statement of Sen. Kirksey, noting submission of report to Senate subcommittee), 1228 (prepared statement of Frank R. Parker, Esq., summarizing report). The report is cited at several points in the Senate Report accompanying amended Section 2. *See* S. Rep. at 10 n.21; 10 n.22; 13 n.35; 51 n.177.

[12] *Kirksey v. Board of Supervisors of Hinds County* (cited in S. Rep. at 29 n.114, 31 n.121).

[13] House hearings at 930 (testimony of Joaquin Avila, Esq., of *amicus* MALDEF). See also id. at 940-42 (prepared statement of Avila); 1253 (testimony of Ruben Bonilla, president of petitioner LULAC, describing same election).

House hearings at 1010. Moreover, witnesses specifically noted the adverse effect of at-large judicial elections on the potential for minority electoral success. Mississippi NAACP Field Director Robert Walker described an attempt by the Mississippi legislature to change from district-based to at-large justice court elections, and stated "[i]f accepted, this obvious attempt to dilute the Black vote would set this State back 100 years." House hearings at 2647. Mississippi State Representative Fred Banks decried this same effort to establish "an at-large system for the election of justices who are now elected by district in the counties." House hearings at 550. The record also contains references to the role played by polarized voting in judicial elections.[14]

Witnesses also testified about minority aspirations to judicial office in the context of the Voting Rights Act. From the first black elected state judge in majority-black Sumter County, Alabama, Honorable Eddie Hardaway, Jr., Congress heard about the importance of the Act in terms of the racial integration of the bench:

[14] *E.g.*, House hearings at 949 (prepared testimony of Avila, describing how a minority candidate for a Texas Court of Appeals judgeship was defeated by racially polarized voting in a 1980 election); Senate hearings at 306 n.33 (prepared statement of Vilma Martinez, President and General Counsel of MALDEF, noting that evidence of polarized voting in justice of the peace elections was submitted to the court in *Seamon v. Upton*, E.D. Tex. No. P-81-19-CA, the Texas congressional reapportionment challenge); House hearings at 260 (prepared statement of Dr. James W. Loewen, Associate Professor of Sociology, University of Vermont, referring to racial polarization in an Alabama judicial race).

> I sit here today, as living proof that a poor, rural black country boy in Alabama can, as a result of the Voting Rights Act, be elected to public office. Without a Voting Rights Act, there is no doubt in my mind that I would not be the district judge of Sumter County.

House hearings at 825.[15] *See also* House hearings at 571 (testimony of Bennie Thompson, contrasting fairness in the administration of justice before and after his election as mayor and judge of Bolton, Mississippi, in response to questioning by Rep. Edwards).[16]

Witnesses made it clear that judicial elections were considered an important target for efforts to increase minority representation in elected office. Describing offices being targeted by black candidates in Sumter County, Alabama, Judge Hardaway stated:

> In 1982, most major offices in county government will be up for grabs. That is, the probate judge, tax assessor, tax collector, circuit clerk, sheriff, and three county commission[ers] will be up for re-election. As it now stands, there is a strong possibility that blacks may be elected to some of these positions.

House hearings at 825. Adolfo Alvarez, a Frio County, Texas commissioner, told the House subcommittee that "[b]ecause of the existence of the Voting Rights Act and our work in the comunity, we now have two Mexican American county commissioners and three Mexican American justices of the peace out of four." *Id.* at 1188.

Additional witnesses pointed to the lack of minority representation on the bench as an evil that had persisted despite advances made under the Voting Rights Act to date. George State Senator Julian Bond noted that "even though Blacks now represent over 26 percent of the Georgia population, they continue to be underrepresented in the halls of the General Assembly, the City Halls, the County courthouses, and the Judicial Chambers of our state." *Id.*, p. 234 (prepared statement). Professor Brian Sherman, in discussing evidence of "low or no [black] representation in county government" in Georgia, pointed out that "[o]f the 47 counties for which we have information, only 1 reports the election of a black judge to superior court since the passage of the Voting Rights Act." House hearings, p. 574.[17]

These references in the hearings to judicial elections are consistent with the understanding that the Voting Rights Act and its provisions, including Section 2, covered all elections. No witness and no member of Congress at any time suggested that judicial elections should be excluded from Section 2's coverage. All of this belies the notion that Congress intended to narrow the Act to exclude judicial elections at the same time it was broadening the Act to better protect the victims of racial discrimination.

II. NOTHING INDICATES CONGRESS INTENDED SECTION 2 TO APPLY ONLY TO ELECTIONS FOR APPELLATE COURT JUDGES AND NOT TO ELECTIONS FOR TRIAL COURT JUDGES.

Part I of Judge Higginbotham's concurring opinion concluded that Congress intended to include judicial elections within the ambit of Section 2. In Part II, however,

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[15] *See also* Senate hearings at 748 (testimony of Abigail Turner, Esq., referring to Judge Hardaway's election).

[16] As Mr. Thompson explained, in towns under 10,000 in Mississippi at the time, the mayor also served as city judge. Under the Fifth Circuit's holding, elections would be covered by Section 2 only with respect to the mayor's office and not with respect to the judicial position.

[17] *See also Voting in Mississippi: A Right Still Denied*, reprinted in House hearings, at 503 (listing numbers of blacks elected to Mississippi Supreme Court, county courts, and justice courts as of 1980). For additional references to judicial elections in the House and Senate hearings, *see* House hearings at 38, 193, 239, 280, 502, 763, 804, 806, 937, 1182, 1205, 1515, 1528, 1535, 1839; Senate hearings at 777, 788-89.

that opinion concluded that while elections for appellate court judges are covered, elections for trial judges are not. That portion of the opinion did not discuss the language of the statute or congressional intent, and is, at most, an explication of what its sponsors believe Congress *should have* intended with respect to Section 2 and trial judges. As to the real issue of what Congress *did* intend, there is absolutely no indication of a desire to include elections for appellate judges while exempting elections for trial judges from Section 2's coverage. As demonstrated in Part I of this brief, the language, purpose and legislative history establish that no elective office or category of elections is excluded from the scope of Section 2. Indeed, the fact that Section 5 covers elections for trial judges, *see Georgia Board of Elections v. Brooks*, also makes it highly unlikely Congress intended to exclude trial judges from the coverage of Section 2.

The concurrence concluded that the state interests behind retaining electoral districts geographically coextensive with trial court jurisdiction are so compelling that they *always* outweigh the interests Congress sought to protect with Section 2, and are therefore immune from Section 2's ban on racial discrimination.

> We are persuaded that, for purposes of the Voting Rights Act, because the fact and appearance of independence and judicial fairness are so central to the judicial task, a state may structure its judicial offices to assure their presence when the means chosen are undeniably directly tailored to the objective. The choice of means by Texas here—tying elective base and jurisdiction—defines the very manner by which Texas' judicial services are delivered at the trial court level . . . . Stated in traditional Fourteenth Amendment terms, there is compelling necessity sufficient to overcome the strict scrutiny of state acts impinging upon a fundamental interest.

911 F.2d at 646. This is a critique of the potential remedy of subdistricting, by which judges are elected

from subdistricts within a judicial district and hear cases from throughout the district. With subdistricts, there would be, in the words of the concurrence, no "tying [of] elective base and jurisdiction." Sections C and D of part II of Judge Higginbotham's opinion are largely a discussion of what he perceives to be the drawbacks of subdistricting. The concurrence cited the so-called "single-member office" exception articulated in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986), in support of the exclusion of trial judges from Section 2's coverage.

This section of the brief will first discuss how any state interests that purportedly underlie at-large trial judge elections can be accommodated within the context of Section 2 enforcement inasmuch as remedies other than subdistricting are available. Second, it will demonstrate that even if subdistricting were the only remedial option, the state's interests would not be threatened. Third, it will show the inapplicability of any "single-member office exception." Finally, it will discuss Judge Higginbotham's mistaken focus on responsiveness and his failure properly to consider the congressional purposes manifest in Section 2.

A. The Appropriateness of Subdistricting as a Remedy Is Irrelevant to the General Applicability of Section 2 Inasmuch as a State May Choose Remedies Other Than Subdistricting That Adequately Protect Any Interests It Has in At-Large Trial Court Elections.

Even if Judge Higginbotham's belief about the undesirability of subdistricting were correct, that has nothing to do with the *general applicability of Section 2* to elections for trial judge. Other remedies are available to the states that can protect any interests a state may have in retaining a congruence between electoral base and jurisdiction.

The matter of the appropriate remedy in a vote dilution case is first left to the responsible state officials.

White v. Weiser, 412 U.S. 783, 794-95 (1973). Those officials could choose from a number of options, any of which would hold out the promise of remedying racial discrimination yet retaining a coextensiveness between electoral base and jurisdiction. The options include "limited voting," which maintains at-large elections but alters other election features—the main alteration being a reduction in the number of votes available to each voter—to prevent white voters from sweeping all of the seats and to give minority voters an opportunity to elect candidates of choice to some of the judgeships. *See Dillard v. Town of Cuba*, 708 F. Supp. 1244 (M.D. Ala. 1988) (approving a consent decree adopting limited voting as a remedy in a Section 2 challenge to at-large elections); Karlan, "Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation," 24 Harv. C.R.C.L. 173, 223-31 (1989). They include "cumulative voting," which retains at-large elections and permits each voter to have as many votes as there are seats, but allows the voter to cast multiple votes for a single candidate. *Id.* at 231-36. They include the creation of smaller and racially fair judicial election districts within a pre-existing district, with cases arising from the new election districts assigned only to judges chosen from those election districts (with judges, of course, being able to help out with overloaded dockets of judges from other election districts just as visiting judges do now in Texas and most other states).[18] The remedial options might include, in a given case, the realignment of counties among existing judicial districts to change the demographics of

[18] The *LULAC* majority and concurring opinions assumed that all subdistricting systems, and all remedial election districts, would necessarily be "single-member." 914 F.2d at 623 (majority opinion); *id.* at 633 (Clark concurrence); *id.* at 649-51 (Higginbotham concurrence). That is not the case. Particularly in urban areas, it is frequently possible to draw majority black or Hispanic election districts that are multi-member and would elect several judges.

the districts, with judges hearing cases arising only from their realigned district. *See SCLC v. Siegelman*, 714 F. Supp. 511, 512 (M.D. Ala. 1989) (challenging the boundary lines between existing judicial districts).

Of course, the initial choice as to the best form of electing judges in the wake of a finding of a Section 2 violation belongs to the states themselves. In the weighing of the various state interests, some may choose subdistricting and some may choose other remedies. At the present time, the only issue before this Court is whether Section 2 is generally applicable. The appropriateness of subdistricting in light of any countervailing state interests is not an issue before this Court, and should be addressed only if and when it is.

B. Even If the Appropriateness of Subdistricting Were Somehow Relevant, the State Interests Identified by the Concurring Opinion Would Not Be Infringed by Subdistricting and Do Not Outweigh the Congressional Purpose of Eliminating Discrimination in Elections.

Even if the concurrence's view of the appropriateness of subdistricting were relevant, it is based upon asserted state interests that would not be infringed by subdistricting. Before discussing those, it is important to note that Congress, in amending Section 2, said the state's policy behind a particular electoral system is only one of many factors to be considered. S. Rep. at 29 and n. 117. The Senate Report—which this Court has said is the "authoritative source" for determining the congressional intent behind Section 2, *Thornburg v. Gingles*, 478 U.S. at 43, n.7—made it abundantly clear that the application of a state's policy in support of a given election system "would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S. Rep. at 29, n. 117. Certainly, if state policy cannot vitiate an otherwise successful Section 2 case, neither can it banish a whole category of elections

from the scope of Section 2 without some congressional indication that the category is excluded.

The state interest that Judge Higginbotham believed would be unalterably compromised by subdistricting is what he called "the fact and appearance of independence and fairness." 914 F.2d at 646.[19] However, nothing suggests that judges elected from subdistricts would be less independent and fair than judges elected from the current system. It would be racially insulting for the State of Texas to believe that judges elected by minority voters will be less independent and fair than the current judges, almost all of whom are white and are elected by white voters with little say from minority citizens. Indeed, if there is any unfairness, it comes from the present system that robs minority voters of an equal vote, and perpetuates a nearly all-white judiciary in the midst of a multiracial society.

Also, the state has no basis to contend that a judge elected from one subdistrict would be biased, or would appear biased, in a case involving a litigant from his or her subdistrict and a litigant from another. If Texas were concerned about that, it would not allow, for instance, a judge from Dallas to sit in a case in which

[19] Judge Sam Johnson's dissent from the Fifth Circuit decision in *LULAC* demonstrates that Texas does not really believe its state interests are unalterably compromised by subdistricting. As Judge Johnson states, the Texas Constitution authorizes subdistricting for justices of the peace and subcounty districts for district courts. 914 F.2d at 669 (Johnson, J., dissenting). Moreover, it should be noted that the district court in *LULAC* found the state's asserted interests to be unpersuasive. That is a finding of fact subject to the clearly erroneous standard of Rule 52, F.R. Civ.P.; *Thornburg v. Gingles*, 478 U.S. at 77-79. The United *States*, as *amicus curiae* in the en banc Fifth Circuit, said "there is evidence in this record which undermines the notion that a remedy which would create subcounty districts would result in biased decisionmaking or even the appearance of biased decisionmaking." Supplemental Brief for the United States as *Amicus Curiae*, *LULAC v. Mattox*, No. 90-8014 (5th Cir.).

one litigant is from Dallas and the other from Houston. No such prohibition exists in state law.[20]

What the state does know is that under a remedial plan minority voters would have a better opportunity to elect candidates of their choice to office, and that some of those candidates would most likely be minorities. But an objection to the application of Section 2 based on such considerations would be intolerable.

Judge Higginbotham also contended that the legitimacy of judicial decisions might come into question because a judge elected from a portion of the county would be making decisions "for the county as a whole." 914 F.2d at 650. This implies that no decision of a trial judge is legitimate unless it is made by a judge chosen by all of the voters. If that were the case, visiting judges would never be allowed to hold court in an area from which they were not elected. Retired judges would never be allowed to step in to help out with overload dockets because the voters had not elected them to a current

[20] Judge Higginbotham's opinion said the State eliminated the appearance of bias in the present system by creating an elaborate set of rules controlling venue. He also said that no similar system of venue rules exists for subdistricts. 914 F.2d at 651. The point about venue rules is that they provide a set of neutral guidelines to determine whether the case should be tried in one district or another (and before a judge from one district or another), thus preventing arbitrary decisions about the matter to be made by someone interested in favoring one litigant over the other. In a subdistricting system, as under the present system, there would be a neutral system of assigning cases to judges, thus preventing arbitrary case-assignment decisions from being made by someone interested in favoring one litigant over the other. Once a decision regarding venue is made according to neutral guidelines, the State of Texas has indicated no concern about having a judge elected in Dallas hear a case involving one litigant from Dallas and another from Houston. Similarly, once a case assignment is made according to neutral guidelines, the State will have no difficulty with a judge elected out of one subdistrict hearing a case involving one litigant from that subdistrict and one from another.

term. Interim judges could not be appointed to fill vacancies prior to an election.[21] Thus, it is clear that the state's interest in the legitimacy of judicial decisionmaking would not be impaired by subdistricting.

All of this indicates that, even if subdistricting were the issue before this Court, the state's interests would not be undermined by the use of a subdistricting remedy.

C. No "Single-Member Office" Exception Removes Trial Judges from the Coverage of Section 2.

The reasoning of the "single-member office" exception articulated by a 2-1 panel majority of the Second Circuit in *Butts v. City of New York* has never been adopted by this Court, and it seems doubtful it would be.[22] Even if it were, it is inapplicable here. By its own terms, the *Butts* "single-member office" exception applies only to offices of which there is one office holder in the jurisdiction, such as a mayor. This notion is applicable to at-large elections only in the logical sense that a mayor cannot be elected other than at-large.

[21] Subdistricts were adopted as a court-ordered remedy in the Secton 2 case involving trial judges in Mississippi, *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988). A number of black judges were elected as a result, but there is no evidence that the Mississippi judicial system has suddenly become infused with a threat to what Judge Higginbotham called "the fact and appearance of independence and fairness."

[22] In *Butts*, the panel majority said runoff requirements for what it called "single-member offices," such as mayor, may not be challenged under Section 2. This holding is inconsistent with the language of Section 2 and the legislative history. As the Solicitor General has stated, the language of Section 2 makes no exception for majority vote runoff requirements "either for single member offices or other types of elected positions." Brief for the United States as Amicus Curiae in *Whitfield v. Clinton*, No. 90-383 (pet. for cert. denied 2/25/91), at 11. The Senate Report accompanying the 1982 amendment indicates that Section 2 applies to majority vote runoff requirements. S. Rep. at 6, 10, 22, 29-30. Thus, it is doubtful that *Butts* was correct when it said runoff requirements for "single-member offices" are immune to Section 2.

By contrast, there are a number of trial judges elected in each of the challenged judicial election districts in Texas. It is not necessary that they all be elected by an at-large, winner-take-all system. The fact that they often exercise decisionmaking power by themselves does not make them "single-member offices" for purposes of *election*. Under the Voting Rights Act, it is the electoral structure that is important, and Congress has never indicated that the function of the office can insulate racially exclusionary election schemes from challenge. If function could preclude coverage of the Act, discriminatory at-large elections for city commissions, in which each commissioner exercises independent decisionmaking authority over a particular area of city operations, might be shielded from challenge. *See, e.g., Buchanan v. City of Jackson*, 708 F.2d 1066, 1067-68 (6th Cir. 1983). That has never been the law.

The "single-member-office" argument, then, as applied to judicial districts that have multiple judgeships, is merely another way of expressing the conclusion that trial judges should not be elected from subdistricts. This remedial concern, again, is not dispositive of Section 2's coverage.

D. The Concurrence Failed to Consider the Interests in Non-Discriminatory Elections That Congress Attempted to Further Through Section 2, and Instead Focused Exclusively on the Issue of Responsiveness.

Judge Higginbotham's balancing of the state's alleged interests was further skewed by his failure to perceive the true nature of the countervailing interests in non-discriminatory elections that Congress has sought to vindicate through Section 2. The Higginbotham concurrence embraced the erroneous notion that Section 2's sole function is to increase minority impact on the day-to-day decisions of governmental officials, including judges, and concluded that subdistricting would not help most mi-

nority *litigants* appear in front of minority judges. 914 F.2d at 649-50.[23]

To the contrary, Section 2's purpose is not simply to increase the extent to which minority interests are considered in government decisions—in this instance, decisions involving individual litigants—but is to give minority voters a fair opportunity to elect candidates "of their choice" (to use the language of Section 2). When voters—be they white, black or Hispanic—vote for judicial candidates, they rarely vote in the expectation that they someday will appear as litigants before the judges who are elected. Instead, they vote for the candidates they believe will do the best job of administering justice. The purpose of Section 2 is to give minority voters a meaningful voice in those electoral decisions.

The legislative history of the 1982 amendment made it clear that the responsiveness of governmental officials to minority interests is a factor of secondary importance in Section 2 cases, and said that "[u]nresponsiveness is not an essential part of plaintiff's case" under Section 2. S. Rep. at 29 and n.116 (1982). Thus, even if minority interests are already fully taken into account in governmental decisions, Section 2 prohibits an election system that denies minority voters an equal and fair opportunity to elect candidates of their choice.

In summary, Judge Higginbotham is wrong to suggest that the state's legitimate interests will be undermined by subdistricting. Moreover, he fails to balance those interests against the fundamental concern protected by Section 2, and that is the right of minority voters to elect candidates of choice free from racially discriminatory election structures.

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[23] Of course, as a result of the present election districts, very few litigants, minority or white, appear in front of minority judges because there are so few.

III. NOTHING INDICATES CONGRESS INTENDED TO EXCLUDE FROM SECTION 2'S COVERAGE AT-LARGE JUDICIAL ELECTIONS FROM DISTRICTS CO-EXTENSIVE WITH THE JURISDICTIONAL AREA SERVED BY THE JUDGES ELECTED.

Judge Clark's concurrence on behalf of himself is similar to Judge Higginbotham's in that Judge Clark believes the state's interest in what he calls "due process neutrality" should immunize from Section 2's coverage all elections from judicial districts that are geographically coextensive with the jurisdictional area served by the judges elected. Judge Higginbotham would carry that principle forward to exclude all trial judge elections. By contrast, Judge Clark would use it to exclude elections for both trial and appellate judges if the election district and the jurisdiction are coextensive, while he leaves open the possibility of a Section 2 challenge to an election district, either trial or appellate, smaller than the jurisdictional area served by the judge elected.

There is absolutely no reason to believe Congress intended such an exception to Section 2's coverage. One of the primary electoral devices Congress intended to combat with Section 2 is discriminatory at-large elections. S. Rep. at 30. Section 5, of course, covers at-large elections where electoral base and jurisdiction are equivalent, and it is doubtful Congress intended to exclude from Section 2's scope a type of election covered by Section 5. *See Georgia Board of Elections v. Brooks.*

Moreover, Judge Clark's view suffers from the same problems as Judge Higginbotham's. They are both based on a belief that the election district and the jurisdictional area must be equivalent to insure what Judge Clark calls "due process neutrality." As mentioned in the discussion of Judge Higginbotham's opinion, that view erroneously assumes that subdistricting is the only available remedy. Also, as stated previously, it wrongly assumes that the state's interest in due process neutrality will be undermined by subdistricts even if they were the only available

remedy, and it fails to consider the overriding congressional purpose of eliminating racial discrimination in all elections.

For all of these reasons, Judge Clark's reasoning, like Judge Higginbotham's, provides no basis for sustaining the judgment below in the *LULAC* litigation.

CONCLUSION

For these reasons, the judgment of the court below in these cases should be reversed.

Respectfully submitted,

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March 4, 1991

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APPENDIX

PUGH, PUGH & PUGH
ATTORNEYS AT LAW

Robert G. Pugh
Robert G. Pugh, Jr.
Lamar P. Pugh

December 28, 1990

Honorable John V. Parker
Chief Judge
United States District Court
Middle District of Louisiana
707 Florida Street
Baton Rouge, Louisiana 70801

Re: Plaintiffs' Motion to the Three-Judge Court To Prevent Judges from Holding Office in the Judgeships for Which No Candidate was Elected Because the Injunction of the United States Supreme Court
Clark v. Roemer, No. 86-435, Section A
U.S. District Court for the Middle District of Louisiana

Dear Judge Parker:

I have been able to determine that the only individual judges who might be affected by the outcome of the captioned motion would be:

Judge James H. Boddie, Jr.
Fourth Judicial District, Division G

Judge Arthur J. Planchard, Jr.
Fourteenth Judicial District, Division E

Judge Charley Quienalty
Fourteenth Judicial District, Division G

Commercial National Tower, Suite 2100
333 Texas Street, Shreveport, Louisiana 71101-5302
Telephone (318) 227-2270 • Telecopier (318) 227-2273

Judge Hawsey, who would have otherwise been affected, retired, he is no longer representing his former district, however, he is serving as an ad hoc judge without a district designation on a series of asbestos cases.

By copy of this letter to Mr. McDuff and Mr. Johnson, I am advising him of my findings.

Yours very truly,

/s/ Robert G. Pugh
ROBERT G. PUGH

RGP/mp

cc: Robert B. McDuff, Esquire
Ernest L. Johnson, Esquire